Supreme Court, U.S.
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In The

Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, ET AL.,

Petitioners,

v.

VERNA KELLY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AND APPENDIX FOR RESPONDENTS

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QUESTION PRESENTED

Whether the State of Minnesota, to foster and preserve the actual and perceived independence and impartiality of its judiciary, may restrict candidates for judicial office from "publicly making known how they would decide issues likely to come before them as judges."

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STATEMENT OF THE CASE

I. The Announce Clause.

This case involves a challenge to a critical component of Minnesota's system of selecting state judges, Canon 5(A)(3)(d)(i) of the Minnesota Code of Judicial Conduct, commonly referred to as the "Announce Clause." This provision was promulgated by the Minnesota Supreme Court and applies to candidates for judicial office. It is intended to preserve the actual and perceived independence and objectivity of Minnesota's judiciary.

As construed by the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit"), the Announce Clause precludes judicial "candidates only from publicly making known how they would decide issues likely to come before them as judges." *Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 881-82 (8th Cir. 2001), Petitioners' Appendix to Petition for Writ of Certiorari ("P.A.") 53a. The Eighth Circuit further interpreted the rule to allow judicial candidates to address publicly a wide range of subjects, including, for example, "general discussions of case law or a candidate's judicial philosophy." *Id.* at 882, P.A. 54a.

On January 29, 2002, the Minnesota Supreme Court removed any uncertainty regarding its interpretation of the judicial canon by adopting the Eighth Circuit's construction of the Announce Clause. *In re Code of Judicial Conduct*, No. C4-85-697, 2002 WL 126537 (Minn. Jan. 29, 2002), Respondents' Appendix ("R.A.") 1. The Minnesota Supreme Court instructed Respondents to enforce the Announce Clause "in accordance with the interpretation of that clause by" the Eighth Circuit. *Id.*, 1-2.

II. States Are Free To Choose from a Variety of Judicial Selection Systems.

Our federal system of government permits each state to determine the manner in which the branches of its government are established and their powers distributed, subject only to the requirement that its government be republican in nature. *See Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring). While the methods by which the federal system and the states select and retain judges are different, the goals are the same: "to create and maintain an independent judiciary as free from political, economic and social pressure as possible. . . . " *Peterson v. Stafford*, 490 N.W.2d 418, 420 (Minn. 1992). To that end, 13 states use merit-selection plans, either without any elections or with retention elections where no opposition is permitted;[1] in six states, judges are appointed by the governor or elected by the legislature;[2] and in the remaining states, some or all of the judges are selected through general elections.[3]

---

[1] These states are: Alaska, Colorado, Connecticut, Delaware, Hawaii, Iowa, Kansas, Maryland, Massachusetts, Nebraska, Utah, Vermont and Wyoming. Robert Berness, Note, *Norms of Judicial Behavior: Understanding Restrictions on Judicial Candidate Speech in the Age of Attack Politics*, 53 Rutgers L. Rev. 1027, 1034, n.47 (2001) (citations omitted); *see also* American Judicature Society, *Judicial Selection Methods in the States, available at* http://www.ajs.org/select11.html.

[2] These states are: Maine, New Hampshire, New Jersey, Rhode Island, South Carolina and Virginia. *Id. See* Berness, *supra*, note 1; American Judicature Society, *supra*, note 1.

[3] The remaining states select their judges through general elections or have hybrid forms combining merit-selection plans and judicial elections. *Id. See* Berness, *supra*, note 1; American Judicature Society, *supra*, note 1.

III. Minnesota Has Adopted a Blended System That Balances Judicial Accountability with Judicial Independence and Impartiality.

Minnesota has adopted a blended system of judicial selection. *See Peterson*, 490 N.W.2d at 425; *see also* The League of Women Voters of Minnesota, *Choosing Minnesota's Judges* 13 (1998), Appellants' Appendix to the Eighth Circuit Court of Appeals, vol. 2, at 296, 313. This blended system reflects Minnesota's history. In 1857, justices of the Minnesota Supreme Court were elected for seven-year terms so that judicial elections were differentiated from and did not coincide with elections for other offices. *Peterson*, 490 N.W.2d at 420. The 1857 constitution restricted judicial office to persons "learned in the law." Minn. Const. art. 6, § 6 (1857) (currently codified as Minn. Const. art. 6, § 5). Implicit in this restriction is the recognition that judges be subject to the ethical canons of the legal profession. *Peterson*, 490 N.W.2d at 422. The term length of judges was reduced to six years in 1883, which led to highly partisan judicial elections. *Id.* at 420. One such election caused the defeat in 1898 of Justice William Mitchell, described as Minnesota's "greatest judge." 1 Hiram F. Stevens, *The History of the Bench and Bar of Minnesota* 66 (1904). In reaction to concerns with partisan judicial elections, the Minnesota Legislature enacted nonpartisan ballot legislation in 1912 to ensure the "judicial impartiality required to decide cases free from political maneuvering." *Peterson*, 490 N.W.2d at 422.

The emphasis placed by the State on judicial independence and impartiality is further reflected in the Minnesota Constitution, which requires the governor to appoint a successor when a judicial vacancy arises. Minn. Const. art. 6, § 8. In stark contrast, legislative vacancies in Minnesota are immediately filled by special election. Minn. Const. art. 4, § 4. Further, in 1972, at a time when other states were adopting retention elections pursuant to the Missouri Plan, Minnesota extended the time period before a newly appointed judge faced reelection. *Peterson,* 490 N.W.2d at 423. The time frame was extended to the next general election occurring *more than one year* (as opposed to thirty days) following the vacancy, to allow the public sufficient opportunity to evaluate the newly appointed judge's competence. Minn. Const. art. 6, § 8 (*amended* 1972); *Peterson,* 490 N.W.2d at 423. In addition, judicial candidates who are incumbents are designated as such on election ballots. Minn. Stat. § 204B.36, subd. 5 (2000).

To further ensure judicial independence and competence, in 1991 the Minnesota Legislature created a Commission on Judicial Selection, which is composed of members appointed by the governor and by the justices of the Minnesota Supreme Court. Minn. Stat. § 480B.01, subd. 2 (2000). The Commission evaluates the merits of applicants for midterm vacancies and recommends to the governor three to five nominees for each open position. *Id.* at subds. 8, 11. The evaluation criteria are "integrity, maturity, health if job related, judicial temperament, diligence, legal knowledge, ability and experience, and community service." *Id.* at subd. 8.

The Minnesota Supreme Court has characterized the Minnesota judicial selection process as a "middle-of-the-road" approach that blends the open election process with a "quasi-retention feature" that informs the voter which candidate is the incumbent and which is the challenger. *Peterson,* 490 N.W.2d at 425. The court has noted that this blended process "acts as a check on the gubernatorial appointment process by keeping the ultimate choice with the voters while, at the same time, recognizing the independent nature of the judicial function." *Id.*

IV. The Announce Clause Is an Integral Part of Minnesota's Blended Approach to Judicial Selection.

The concept of an announce clause originated more than seventy-five years ago when the American Bar Association ("ABA") adopted Canon 30 of the Model Canons of Judicial Ethics. This Canon provided that a candidate for judicial office "should not announce in advance his conclusions of law on disputed issues to secure class support." ABA Canons of Judicial Ethics Canon 30 (1924), Joint Appendix ("J.A.") 339-40.

The announce clause evolved over the years. In 1972, the ABA drafted a Model Code of Judicial Conduct, which included an announce clause similar to the 1924 version. *See* ABA Model Code of Judicial Conduct Canon 7(B)(1)(c) (1972), J.A. 364. In 1990, the ABA once again updated the Model Code announce clause to prohibit a judicial candidate from making statements that commit or appear to commit the candidate concerning cases, controversies, or issues that are likely to come before the court. *See* ABA Model Code of Judicial Conduct Canon

5(A)(3)(d)(ii) (1990), J.A. 351. Today, most states with elected judiciaries have adopted campaign speech restrictions modeled after either the 1972 or the 1990 Model Code. *Republican Party*, 247 F.3d at 880, P.A. 50a.

V. Petitioners' Challenge to the Announce Clause.

In August 1997, Petitioner Wersal acknowledged: "As a practical matter, the Code allows judicial candidates to discuss their judicial philosophy, such as whether they believe in the strict interpretation of the Constitution, and to criticize prior court decisions. I am able to effectively get out a message without violating even the most restrictive interpretation of the Code." J.A. 44 (August 15, 1997 letter to members of the Constitution Committee of the Republican Party from Wersal).

In February 1998, Petitioner Wersal sought an advisory opinion from the Lawyers Professional Responsibility Board as to whether they would enforce the provisions of Canon 5, which, among other things, contains the Announce Clause. The Lawyers Board advised Petitioner Wersal that he had not provided it with information about any particular statements he wished to make that expressed views on a disputed legal or political issue. *Republican Party*, 247 F.3d at 859, P.A. 12a. A few days after receiving this advisory opinion, Petitioner Wersal filed this action. *Id.*

VI. Proceedings Below.

The district court narrowly construed the Announce Clause to prohibit "discussion of a judicial candidate's

predisposition to issues likely to come before the court." *Republican Party of Minnesota v. Kelly*, 63 F. Supp. 2d 967, 986 (D. Minn. 1999), P.A. 129a. Based on this construction, the district court upheld the Announce Clause because it "serves the state's compelling interest in maintaining the actual and apparent integrity of its judiciary, while not unnecessarily curtailing protected speech." *Id.*

The Eighth Circuit articulated the district court's construction of the Announce Clause as prohibiting judicial candidates "only from publicly making known how they would decide issues likely to come before them as judges." 247 F.3d at 881-82, P.A. 53a. The Eighth Circuit specifically noted that numerous matters can be the subject of public discourse by judicial candidates, including, for example, "general discussions of case law or a candidate's judicial philosophy." *Id.* at 882, P.A. 54a.

In their reply brief filed with the court of appeals, Petitioners for the first time asserted that the district court erred in narrowly construing the Announce Clause. The Eighth Circuit found that Petitioners waived the issue by not raising it in their opening briefs. *Id.* at 881, P.A. 52a. The court of appeals stated further that, if the issue had been properly raised, the court "would not find error in the district court's interpretation." *Id.* at 881, P.A. 52a-53a. The Eighth Circuit concluded that the Announce Clause, as construed, "furthers compelling governmental interests in the independence and actual and perceived impartiality of the judiciary." *Id.* at 881, P.A. 52a. The court of appeals also held that the construed Announce Clause was "narrowly tailored" to further Minnesota's compelling governmental interests. *Id.* at 883, P.A. 56a.

The dissenting court of appeals judge agreed that the Minnesota Supreme Court "may protect its judiciary against both actual and the appearance of impartiality." *Id.* at 903, P.A. 92a. The judge further opined that a Minnesota state court should construe Minnesota state law and the court of appeals "ought not inject ourselves into the state law question." *Id.* at 891, P.A. 71a. The dissent disagreed with the majority about the scope of the Announce Clause, stating that the clause, even as narrowly construed, allows a judicial candidate to say "nothing at all." *Id.* at 894, 899 n.41, P.A. 76a-77a, 85a n.41.

On January 29, 2002, the Minnesota Supreme Court expressly adopted the Eighth Circuit's interpretation of the Announce Clause. *In re Code of Judicial Conduct*, No. C4-85-697, 2002 WL 126537 (Minn. Jan. 29, 2002), R.A. 1. It therefore directed Respondents to enforce the Announce Clause in accordance with the court of appeals' interpretation of the clause. *Id.*, 1-2.

SUMMARY OF THE ARGUMENT

Minnesota's Announce Clause has been narrowly construed by the court of appeals and by the Minnesota Supreme Court to permit judicial candidates to publicly discuss a wide array of subjects and issues. The only speech restricted by the clause is the announcement by candidates as to how they would decide issues likely to come before them as judges. The Announce Clause is necessary to restrict such announcements to protect the State's compelling governmental interests in an actual and perceived independent and impartial judiciary. These

interests are "undeniably compelling" and of the "highest order." *Republican Party*, 247 F.3d at 864, P.A. 21a. Indeed, the importance of Announce Clause principles was recognized by the Justices of this Court at their respective confirmation hearings.

The State has compelling interests in an independent and impartial judiciary. An independent judiciary – as free as possible from political, economic and social pressure – is an essential element of Minnesota's judicial system. Equally important are the due process rights and justified expectations of Minnesota citizens that impartial judges will preside over cases to which they are parties.

The State also has compelling interests in preserving public confidence in the independence and impartiality of its judiciary. The judicial system depends on the trust of its citizenry to operate and loss of that trust would seriously undermine the judicial system. "Our legal system can function only so long as the public, having confidence in the integrity of its judges, accepts and abides by judicial decisions." *Complaint Concerning Winton*, 350 N.W.2d 337, 340 (Minn. 1984).

Public confidence in the judicial system is completely undermined when candidates publicly announce how they would decide an issue likely to come before them and are later called upon to render a decision in a case involving the issue. Public trust in the judiciary is undermined regardless of whether the judge decides the case consistent with his prior campaign statements. If the judge's decision is consistent with his campaign statements, the judge will be perceived as prejudging the case and not basing the decision on the facts and law of the

case. If the decision contradicts prior campaign statements, the judge will be seen as someone who makes statements merely to get elected without intending to fulfill expectations. In either case, public confidence in the judicial system is severely eroded.

During their confirmation hearings, all of the Justices of this Court recognized and honored the same principles that underlie the Announce Clause. Each acknowledged that a nominee for judicial office must refrain from stating positions on issues likely to come before the Court. This restraint is necessary to preserve the integrity of the judicial process and to promote both the actual and perceived fairness in the judicial system.

The Announce Clause strikes an appropriate balance between the public's right to an actual and perceived independent and impartial judiciary and the First Amendment rights of candidates running for judicial office. Campaign statements are intended to appeal to voters and create expectations as to future performance by the candidate if elected. While candidates for executive or legislative branch offices are expected to make such statements, the very purpose of the judicial function – to decide cases based on the law and facts of each case – is severely compromised if judicial candidates make such statements.

The Announce Clause, as interpreted by the Eighth Circuit and definitively construed by the Minnesota Supreme Court, *In re Code of Judicial Conduct*, R.A. 1, is narrowly tailored to promote the State's compelling interests. Petitioner Wersal himself has acknowledged that he could "effectively get out [his] message without violating

even the most restrictive interpretation of the Code." J.A. 44.

The Announce Clause limits judicial candidates "only from publicly making known how they would decide issues likely to come before them as judges." *Republican Party*, 247 F.3d at 882-83, P.A. 53a; R.A. 1. Judicial candidates are permitted to engage in general discussions of the law and their judicial philosophy. They are also able to discuss or publicize information about a host of other matters including their character, fitness, integrity, background, education, legal experience, work habits, and abilities, all of which are relevant to the determination of a candidate's qualification for office. The Announce Clause *only* restricts speech that *directly* threatens the underpinnings of Minnesota's judicial system.

No less restrictive alternatives to the Announce Clause adequately protect Minnesota's compelling interests. The "pledges or promises" clause in Canon 5 prohibits candidates from making only the most blatant types of statements that threaten the State's interests. That clause simply does not go far enough. A candidate can make many campaign statements that fall short of being pledges or promises but still convey to the public how the candidate will decide issues that are likely to come before the court.

The availability of recusal or disqualification of judges likewise does not adequately protect the State's interests. First, these procedures would not always protect a particular litigant against judicial campaign announcements that prejudged his case. Second, they do not remedy the loss of public confidence in the judicial

system that would result if judicial candidates routinely opined on issues likely to come before them. Further, the widespread use of recusals or disqualifications would severely hamper the State's efforts to maintain an efficiently operating judicial system.

Contrary to Petitioners' claims, life tenure and elimination of judicial elections are also not meaningful alternatives to the Announce Clause. As the Eighth Circuit recognized, the "all or nothing" argument that a state can seek to promote judicial independence *or* it can choose to conduct judicial elections, but not both, is simply unfounded.

Similarly without merit is Petitioners' contention that the Announce Clause, as interpreted by the Eighth Circuit and the Minnesota Supreme Court, is unconstitutionally vague. Under precedent of this Court a law can only be declared unconstitutional for vagueness if people of ordinary intelligence, exercising ordinary common sense, "must necessarily guess at its meaning." *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973). The import and meaning of the Announce Clause is clear: judicial candidates cannot publicly make known how they will decide cases likely to come before them as judges. The decision of the court of appeals should be affirmed.

ARGUMENT

In holding that the Announce Clause does not violate a judicial candidate's right to freedom of speech under the First and Fourteenth Amendments, the Eighth Circuit

invoked strict scrutiny and examined the clause to determine whether it was narrowly tailored to serve a compelling state interest. *Republican Party*, 247 F.3d at 864, P.A. 20a. The Eighth Circuit appropriately determined that Minnesota's interests in an actual and perceived independent and impartial judiciary were "undeniably compelling" and of the "highest order." *Id.* at 864, P.A. 21a. In addition, the Eighth Circuit correctly concluded that the Announce Clause was "necessary to further" those compelling interests and was "narrowly tailored." *Id.* at 876-77, 883, P.A. 44a, 56a.

The Eighth Circuit described one of the ills to be addressed by the Announce Clause as follows:

> When a candidate is later called upon as a judge to preside over cases involving disputed issues about which he or she has made campaign announcements, the judge is placed in an *awkward, if not impossible, position*. Should the judge properly determine, for example, that a law violates the Constitution, having already expressed this opinion during the campaign, the judge risks appearing as though he or she *prejudged the case rather than gave it due consideration in light of the law, arguments, and facts*. This apparent rigidity can *undermine the faith of the litigants and public* in the judge's decision and in the State's judicial system generally. . . . On the other hand, should the judge reach a conclusion that departs from the opinion expressed during the campaign, the judge risks *being assailed as a dissembler*.

Republican Party, 247 F.3d at 878, P.A. 46a (emphasis added) (citation omitted).

As discussed below, in their confirmation hearings before the United States Senate all of the members of this Court relied upon Announce Clause principles to decline to answer specific questions on issues likely to come before this Court. The Court is now called on to determine whether these same principles will be applicable to future state and federal judges. If the Announce Clause were held invalid as applied to state judges, then the propriety of the use by federal judicial nominees of Announce Clause principles would also be affected.

I. Minnesota Has "Undeniably Compelling" Interests in, and Its Citizens Have a Due Process Right to, the Actual and Perceived Independence and Impartiality of Its Judiciary.

In *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), the Supreme Court held that the government's compelling interest in restricting a postal worker from participating in elections and campaigns was greater than the postal employee's First Amendment rights to political association. This Court also stated that the government has a compelling interest to make certain that public confidence in government activity is not eroded by the weight of political considerations that would inevitably be imposed on a federal employee by elected officials. *Id.* at 565.

The essence of Petitioners' argument is that the public deserves judges who have less independence and impartiality than their mail carriers. Respondents disagree.

A. The State's Interests in Judicial Independence and Impartiality Are Compelling.

As stated by the Eighth Circuit, "[t]here is simply no question that a judge's ability to apply the law neutrally is a compelling government interest of the highest order." *Republican Party*, 247 F.3d at 864, P.A. 21a. *See, e.g., Morial v. Judiciary Comm'n*, 565 F.2d 295, 302 (5th Cir. 1977) ("Ours is an era in which members of the judiciary often are called upon to adjudicate cases squarely presenting hotly contested social or political issues. The state's interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party, or person is entitled to the greatest respect.").

Justice Breyer described the importance of an independent judiciary during his Senate confirmation hearings, when he referred to the way in which the formality of the judicial process symbolizes the importance of an independent judiciary:

> Why is it that judges wear black robes? I have always thought that the reason that a judge wears a black robe is to impress upon the people in the room that a particular judge is not speaking as an individual. In an ideal world, the personality of the judge, the face of the judge, would not be significant because when the judge speaks with a black robe on, in no matter what court, the judge is speaking for the law. And in an ideal world, the law is the same irrespective of the personality of the judge.

Nomination of Stephen G. Breyer to be An Associate Justice of the Supreme Court of the United States: Hearings Before the S.

Comm. on the Judiciary, 103d Cong. 119 (1994) [hereinafter *"Breyer Nomination Hearings"*].

Minnesota has long placed great importance on having an impartial and independent judiciary. As noted by the Minnesota Supreme Court, an independent judiciary is an essential element of Minnesota's judicial selection system:

> The methods by which the federal system and other states initially select and then elect or retain judges are varied, yet the explicit or implicit goal of the constitutional provisions and enabling legislation is the same: to create and maintain an independent judiciary as free from political, economic and social pressure as possible so judges can decide cases without those influences. . . . While the framers of our state constitution have developed a system of selection and election quite different from that federal scheme, they too designed a plan to recognize the uniqueness and independence of the state judiciary.

Peterson, 490 N.W.2d at 420.

Indeed, citizens have a right guaranteed by the Due Process Clause of the Fourteenth Amendment to an impartial judge. *See Tumey v. Ohio*, 273 U.S. 510 (1927) (holding that Fourteenth Amendment requires judge to impartially apply law); *In re Murchison*, 349 U.S. 133 (1953) (holding that defendant is deprived of due process when judge's involvement in prior proceedings undermine his independence). The State of Minnesota has a compelling government interest in ensuring that these

due process rights are not violated. As Minnesota Supreme Court Justice Loring explained:

> Nothing so shakes the confidence of the people in their courts and arouses contempt for their government, as politically minded judges. There can be no propriety in any influence which tends, consciously or otherwise, to prevent impartiality . . . .

Moon v. Halverson, 206 Minn. 331, 335, 288 N.W. 579, 582 (1939) (Loring, J., concurring specially).

In their Senate confirmation hearings, Justices of this Court have explicitly recognized the need to refrain from making certain statements in order to maintain their impartiality both in appearance and in actuality. For example, Chief Justice Rehnquist underscored the importance of judicial impartiality when he declined to answer questions at his Senate confirmation hearings on such topics as civil rights and public accommodation, wiretapping and surveillance, congressional power to prohibit troops in Laos, and a newspaper's right to advocate violence. *The Nominations of William H. Rehnquist and Lewis F. Powell, Jr. to be Associate Justices of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 92d Cong. 34, 39, 56, 141 (1971).

It is well-settled that judicial impartiality and independence are compelling governmental interests that the State is entitled to preserve through such means as the Announce Clause. The Minnesota Supreme Court has long affirmed the importance of these interests to Minnesota's judicial system. Further, these interests are rooted in both the Minnesota and federal constitutions. Thus, they are compelling interests of the "highest order." *Republican Party*, 247 F.3d at 864, P.A. 21a.

B. Minnesota Has Compelling Interests in Preserving Public Confidence in an Independent and Impartial Judiciary.

As the Eighth Circuit stated, and Petitioners do not dispute, "[t]he governmental interest in an independent and impartial judiciary is matched by its equally important interest in preserving public confidence in that independence and impartiality." *Republican Party*, 247 F.3d at 867, P.A. 26a, *citing Cox v. Louisiana*, 379 U.S. 559, 565 (1965) ("A State may also properly protect the judicial process from being misjudged in the minds of the public."); *and Suster v. Marshall*, 149 F.3d 523, 532 (6th Cir. 1998) (stating that the State's interest in preventing judicial corruption or appearance of corruption is compelling). The State has a compelling interest in maintaining a judiciary that appears impartial and independent to litigants and non-litigants alike.

Members of the judiciary are often called on to adjudicate issues of great public concern. "If judicial candidates during a campaign prejudge cases that later come before them, the concept of impartial justice becomes a mockery." *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 142 (3rd Cir. 1991). As Chief Justice Randall Shepard of the Indiana Supreme Court explained, "for a judicial system to function, it must gain and keep the trust of the citizenry. A loss of faith in the impartiality of the judiciary would destroy it as quickly as actual bias." Randall Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 Geo. J. Legal Ethics 1059, 1059 (1996). Indeed, a review of disciplinary cases against judges indicates that most infractions relate not as much to individual acts of

incompetence or favoritism as to conduct that undermines public confidence in the judiciary. *See* Vivi Dilweg, et al., *Modern Judicial Ethics* (1992); Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* (3d ed. 2000).

The Minnesota Supreme Court has recognized the State's compelling interest in judges who not only are independent and impartial, but who also *appear* to be independent and impartial:

> A judge has a position of power and prestige in a democratic society espousing justice for all persons under law. . . . *Our legal system can function only so long as the public, having confidence in the integrity of its judges, accepts and abides by judicial decisions.*

Complaint Concerning Winton, 350 N.W.2d 337, 340 (Minn. 1984) (emphasis added). *See also Letter Carriers*, 413 U.S. at 565 ("[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.").

II. The Announce Clause As Construed Furthers Minnesota's Compelling Interests and Appropriately Balances Citizens' Rights to a Judiciary That Is and Appears To Be Independent and Impartial with the First Amendment Rights of Judicial Candidates.

As recognized by the Eighth Circuit, the Announce Clause furthers the compelling interests of the State of

Minnesota in the actual and perceived independence[4] and objectivity of the judiciary. *Republican Party*, 247 F.3d at 881, P.A. 52a. In addition, the Announce Clause appropriately balances a judicial candidate's First Amendment rights with the rights of the citizens of Minnesota, including both litigants and non-litigants, to have a judicial system that is, and appears to be, independent and impartial.

A. The Announce Clause Protects Litigants' Due Process Rights to an Independent and Impartial Judiciary.

As discussed above, litigants have a due process right to an independent judiciary. *See Tumey*, 273 U.S. at 523; *In re Murchison*, 349 U.S. at 136; *Ward v. Vill. of Monroeville*, 409 U.S. 57, 60 (1972) (holding that adjudicator's political interest in maintaining the solvency of village "would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict . . . .") (quoting *Tumey*, 273 U.S. at 532).

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[4] Petitioners concede that Minnesota has compelling interests in an independent and impartial judiciary. Pet'r RPM Br. at 5-7. Nevertheless, they contend that judicial independence is not implicated in this case because Minnesota's constitution guarantees an independent judiciary. *Id.* at 8. Petitioners themselves recognize, however, that judicial impartiality is linked to judicial independence. *Id.* at 7. Judicial independence arises from a judge's ability to decide cases without the influence of social, political, and economic pressures. *Peterson*, 490 N.W.2d at 420. Such independence of a judge, as well as impartiality, is certainly furthered by the Announce Clause. *See generally Republican Party*, 247 F.3d at 877-881, P.A. 44a-52a.

Courts resolve some of the most important issues in society and in people's lives, including difficult disputes over their freedoms and property rights. Due process requires that litigants have the opportunity to have those disputes resolved by judges only on the basis of the law and facts of the particular case. The responsibility of the courts to afford litigants due process of law is the hallmark of a just society, and the political interests of a judicial candidate should not impede such a fundamental right.

In her confirmation hearings, Justice O'Connor explained why Announce Clause principles are necessary to protect the due process rights of future litigants:

> [I]n one sense we are all the product certainly of our experiences. People assume the role of the judge encumbered, if you will, by the product of those experiences. Judges do, I suppose, as has been pointed out, read newspapers and listen to the radio and watch television to some extent, so all are influenced to some greater or lesser degree by those experiences.
>
> However, *the framework within which a given case is decided should, in my view, be limited to the record and to the briefs and the arguments, and should not really be resolved on the basis of outside social concerns, if you will.*

Nomination of Sandra Day O'Connor: Hearings Before the S. Comm. on the Judiciary, 97th Cong. 131 (1981) (emphasis added).

Indiana Chief Justice Shepard explained that Announce Clause principles represent a careful balance

between a litigant's due process right to an impartial judge and a judicial candidate's right to free speech:

> Should more weight be given to the free speech and political interests of the campaigning judge or to the due process interests of citizens who will appear before this judge? Certainly the free speech value is great, but we cannot forget that litigants come before these judges hoping the disputes involving their families, homes, and personal liberty will be resolved on the basis of the law and the facts alone. One might as easily describe this choice as choosing between cure and prevention. Should the rules restraining speech involving adjudicatory promises be struck down facially, deciding in effect that the price of public disapprobation of judicial officers and of partiality toward future litigants should be paid in the name of free speech? Or should the judge place more value on the ability of courts to afford litigants due process of law in individual cases, and affirm the canons designed to prevent political speeches that will diminish the courts' ability to render impartial justice and their ability to be viewed as partial?

Shepard, *supra*, at 1090-91 (footnote omitted).

Election speech, if it is to be effective, creates expectations of the candidate's future performance. Statements made during the course of a campaign weigh heavily on all political officeholders, but especially on judicial candidates:

> [A] popularly elected judge wins office through a selection system designed to promote electoral accountability, but his office then requires resistance to pressure from those [who] helped elect

> him as well as to those whom the judge will ultimately be responsible in some form of re-election. This problem is most acute upon the eve of an election when, according to one often quoted jurist, ignoring the political consequences of a judicial decision "would be like ignoring a crocodile in your bathtub."

Daniel Burke, *Code of Judicial Conduct Canon 7B(1)(c): Toward the Proper Regulation of Speech in Judicial Campaigns*, 7 Geo. J. Legal Ethics 181, 181-82 (1993) (citation omitted) (footnotes omitted).

Judicial elections differ significantly from legislative or executive elections. The Eighth Circuit noted the substantial differences between judicial offices and legislative and executive offices:

> The functioning of the judicial system differs markedly from those of the executive and legislative. In those areas, the public has the right to know the details of the programs that candidates propose to enact into law and administer. Pledges to follow certain paths are not only expected, but are desirable so that voters may make a choice between proposed agendas that affect the public. By contrast, the judicial system is based on the concept of individualized decisions on challenged conduct and interpretations of law enacted by other branches of government.

Republican Party, 247 F.3d at 862, P.A. 17a, *quoting Stretton*, 944 F.2d at 142. *See also Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993) (noting that judges are different from legislative and executive branch candidates "in ways that bear on [the] strength of the state's

interest in restricting their freedom of speech."); *Berger v. Supreme Court*, No. 87-3935, 1988 WL 114792, at *3 (6th Cir. Oct. 31, 1988) ("[W]e agree with the district court that '[t]he very purpose of the judicial function makes inappropriate the same kind of particularized pledges and predetermined commitments that mark campaigns for legislative and executive office.' ").

In his Senate confirmation hearings, Justice Kennedy recognized these differences between judges and other types of officeholders:

> I think if a judge decides a case because he or she is committed to a result, it destroys confidence in the legal system.
>
> Senators and Representatives are completely free to vote for a particular bill because it favors labor, or because it favors business. That is the way politics works, and that is your prerogative. To identify such an interest, it seems to me, is very candid.
>
> That is improper for a court. The court must base its decision on neutral principles applicable to all parties. That is inconsistent, in my view, with deciding a case because it reaches a particular result.

Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 100th Cong. 144 (1987).

The very nature of a campaign for legislative or executive office creates the expectation that candidates for those offices will announce how they will vote on or decide issues that will come before them. This type of campaigning, however, is "fundamentally at odds with

the judges' obligation to render impartial decisions based on the law and facts." *Republican Party*, 247 F.3d at 877, P.A. 44a-45a. As has been recognized:

> Unlike legislators, county commissioners, or executives, judges are compelled by training, inclination, theory, and practice to endeavor to ignore political or economic interests in resolving disputes. . . . Judges also must be isolated from the political pressures and prejudices of society in order to protect individuals and minorities from the tyranny of the majority.

John B. Gates & Charles A. Johnson, *The American Courts: A Critical Assessment* 165 (1991).[5]

Justice Souter observed during his United States Senate confirmation hearings the improper pressure that is placed upon a judge if Announce Clause principles are disregarded, noting that "[a]nything which substantially could inhibit the court's capacity to listen truly and to listen with as open a mind as it is humanly possible to have, should be off limits to a judge." *Nomination of David H. Souter to be Associate Justice of the Supreme Court of the*

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[5] *See also* The League of Women Voters of Minnesota, *Choosing Minnesota's Judges* 11 (1998), Appellants' Appendix to the Eighth Circuit Court of Appeals, vol. 2, at 296, 311 (citing to statement made by retired Minnesota Supreme Court Chief Justice Sandy Keith) ("A legislator represents and serves a constituency, whereas a judge's constituency is everyone and no one. A judge represents only the law, serves litigants by ruling in accordance with it, and may be called upon to protect the minority from the majority.").

United States: Hearings Before the S. Comm. on the Judiciary, 101st Cong. 194 (1990). He continued:

> Is there anyone who has not, at some point, made up his mind on some subject and then later found reason to change or modify it? No one has failed to have that experience.
>
> [I]t is much easier to modify an opinion if one has not already stated it convincingly to someone else.
>
> *[C]an you imagine the pressure that would be on a judge who had stated an opinion, or seemed to have given a commitment in these circumstances to the Senate of the United States, and for all practical purposes, to the American people?*
>
> You understand the compromise that that would place upon the judicial capacity and that is my reason for having to draw the line.

Id. (emphasis added).

Minnesota's Announce Clause mirrors the restraints that the Justices of this Court believe are essential to ensure a neutral judiciary. If judicial candidates were permitted to publicly make known how they would decide issues likely to come before them as judges, their elections would be no different from campaigns for legislative or executive office. Yet, while legislative or executive candidates may be expected to unabashedly voice their views on particular issues, it is the absence of such statements that ensures the integrity and neutrality of Minnesota's judicial system.

The Announce Clause, as construed by the Minnesota Supreme Court, protects Minnesotans' due process rights to an impartial and independent judiciary. The independence of the judiciary is critical to ensure that all citizens

experience the even hand of justice. The Announce Clause represents an appropriate balance between the campaign-speech rights of judicial candidates and the promise that those who come before the courts in Minnesota will be afforded due process under the law.

B. The Announce Clause Protects the Right of Litigants to a Judiciary That They Perceive As Independent and Impartial.

Restrictions on the First Amendment rights of judges have been found necessary in a variety of circumstances. For instance, a judicial candidate "does not have a First Amendment right to promise to abuse his office." *Republican Party,* 247 F.3d at 862-63, P.A. 18a, *citing Brown v. Hartlage,* 456 U.S. 45, 55 (1982) (stating that certain campaign promises "may be declared illegal without constitutional difficulty"). A judge does not have a First Amendment right to comment to the media about the conduct of parties to a proceeding before the judge, *United States v. Microsoft Corp.,* 253 F.3d 34 (D.C. Cir.), *cert. den.,* 122 S. Ct. 350 (2001); to refer to female lawyers as "lawyerettes," *Complaint Concerning Kirby,* 354 N.W.2d 410 (Minn. 1984); or to make televised statements regarding a murder case pending before a different judge. *In re Porter,* Minn. Bd. on Judicial Standards (1992) (cited in Shaman, *supra,* at 352 n.265). A judge also does not have a First Amendment right to pose for newspaper pictures at a benefit to raise defense money for criminal defendants in his judicial district, *In re Bonin,* 378 N.E.2d 669 (Mass. 1978); to call a district attorney immature, inexperienced, unqualified, and incompetent, *In re Conduct of Schenk,* 870 P.2d 185 (Or. 1994); to accuse non-party corporate officers

of a defendant IUD manufacturer of personal and professional misconduct, *Gardiner v. A.H. Robins Co., Inc.*, 747 F.2d 1180 (8th Cir. 1984); or to say that it would be difficult to impose the death penalty on the murderer of gays or prostitutes because the victims asked for it. *Inquiry Concerning a Judge No. 52*, Unreported Determination (Tex. Comm'n on Judicial Conduct 1989) (cited in Shaman, *supra*, at 352 n.266).

The principle underlying these restrictions on judicial speech is that litigants have a due process right to appear before judges they perceive as independent and impartial. Justice Breyer described the importance of this Announce Clause principle when he declined at his Senate confirmation hearing to answer certain questions regarding issues likely to come before the Court:

> Let us imagine, if I am lucky and if you find me qualified and vote to confirm me, I will be a member of the Supreme Court, and, as a member of that Court, I will consider with an open mind the cases that arise in that Court. And there is nothing more important to a judge than to have an open mind and to listen carefully to the arguments.
>
> I do not want to predict or to commit myself on an open issue that I feel is going to come up in the Court. . . . There are two real reasons.
>
> The first real reason is how often it is when we express ourselves casually or express ourselves without thorough briefing and thorough thought about a matter that I or some other judge might make a mistake. . . . The other reason, which is equally important, is . . . it is so

> important that the clients and the lawyers understand the judges are really open-minded.

Breyer Nomination Hearings, supra, at 114.

Justice Thomas similarly explained the relationship between Announce Clause principles and the need for judges to appear impartial when he declined to answers questions of the United States Senate regarding positions he may take on issues likely to come before this Court:

> [It] is important for any of us who are judges, in areas that are very deeply contested, . . . we have to look ourselves in the mirror and say: Are we impartial or *will we be perceived to be impartial*? I think that to take a position would undermine my ability to be impartial, and I have attempted to avoid that in all areas of my life after I became a judge.

Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 102d Cong. 180 (1991) (Part 1) (emphasis added).

Similarly, Justice Scalia acknowledged the importance of Announce Clause principles, noting at his confirmation hearings that the appearance of his impartiality could be placed in doubt if he were to respond to questions regarding whether he expected to overrule a particular case if confirmed:

> Let us assume that I have people arguing before me to do it or not to do it. I think it is quite a thing to be arguing to somebody who you know has made a representation in the course of his confirmation hearings, and that is, by way of condition to his being confirmed, that

> he will do this or do that. *I think I would be in a very bad position to adjudicate the case without being accused of having a less than impartial view of the matter.*

Nomination of Judge Antonin Scalia: Hearings Before the S. Comm. on the Judiciary, 99th Cong. 37 (1986) (emphasis added).

The Announce Clause, as construed by the Minnesota Supreme Court, protects the right of litigants to a judiciary that they perceive as independent and impartial. In this way, it appropriately balances the interests of the candidates in campaign speech with the interests of litigants in adjudication of disputes by judges they perceive as fair.

C. The Announce Clause Furthers the State's Compelling Interest That the Public Have Confidence in an Independent and Impartial Judiciary.

To have confidence in the judicial system, members of the public at large, regardless of whether they ever set foot into a courtroom, must believe their judiciary is impartial and independent. Justice Ginsburg noted the need for public confidence in the judicial system when she referred to Announce Clause principles in declining to answer certain questions in her Senate confirmation hearing:

> Because I am and hope to continue to be a judge, it would be wrong for me to say or to preview in this legislative chamber how I would cast my vote on questions the Supreme Court may be called upon to decide. Were I to rehearse

> here what I would say and how I would reason on such questions, I would act injudiciously.
>
> Judges in our system are bound to decide concrete cases, not abstract issues. Each case comes to court based on particular facts and its decision should turn on those facts and the governing law, stated and explained in light of the particular arguments the parties or their representatives present. *A judge sworn to decide impartially can offer no forecasts, no hints, for that would show not only disregard for the specifics of the particular case, it would display disdain for the entire judicial process.*

Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 103d Cong. 52 (1993) (emphasis added).

Recognizing that a judicial candidate's comments can undermine the public's confidence in the judiciary, Justice Stevens declined to discuss certain issues during his confirmation hearings:

> I really don't think I should discuss this subject generally, Senator. I don't mean to be unresponsive but in all candor I must say that there have been many times in my experience in the last five years where I found that my first reaction to a problem was not the same as the reaction I had when I had the responsibility of decisions and I think that if I were to make comments that were not carefully thought through they might be given significance that they really did not merit.

Nomination of John Paul Stevens, to be a Justice of the Supreme Court: Hearings Before the S. Comm. on the Judiciary, 94th Cong. 26-27 (1975).

The appearance that a judge has predetermined a case is contrary to the public's expectation of fairness and objectivity in the judicial system. *See Stretton*, 944 F.2d at 142. If the judge decides the case in a manner inconsistent with his or her campaign pronouncements, the judge risks being viewed as disingenuous, which also damages the public's perception of the judicial system. *Republican Party*, 247 F.3d at 878, P.A. 46a. Whichever way the judge rules, the loser in the case is the public's faith in the judiciary. The Announce Clause eliminates the dilemma, thereby fostering Minnesota's interest in preserving the public's confidence in the independence and impartiality of its judicial system.

The Announce Clause, as construed by the Minnesota Supreme Court, helps to ensure the right of the public at large to a judicial system in which it has confidence and for which it has respect. In this way, the Announce Clause appropriately balances the First Amendment interests of judicial candidates with the greater interests of the public in the justness of their judicial system.

D. The State of Minnesota Has Demonstrated the Need for the Announce Clause.

In *Burson v. Freeman*, 504 U.S. 191 (1992), this Court detailed the evidentiary support necessary to justify a restriction on speech. *Burson* involved a law that imposed a 100-foot "campaign-free" zone around polling places. The government argued that the zone was intended to

protect against voter intimidation and election fraud. The Court examined the evolution of election reform, including nineteenth-century ballot reforms, the development of restrictions on election day campaigning, and similar polling place restrictions in all 50 states. *Id.* at 202-06. It then determined that this history revealed a "widespread and time-tested consensus" about the problems of voter intimidation and voter fraud. This consensus provided sufficient evidentiary support to justify a "campaign-free" zone around polling places. *Id.* at 206. *See also Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.").

The Eighth Circuit similarly found that Respondents "met their evidentiary burden by offering evidence of widespread and longstanding consensus among members of the bench and bar about the necessity of restrictions on campaign speech that conveys a judicial candidate's propensity to decide cases in a particular way." *Republican Party*, 247 F.3d at 879, P.A. 49a. This evidence included the 75-year history and evolution of an announce clause as contained in the ABA's Canons of Judicial Ethics; *Peterson v. Stafford*, 490 N.W.2d 418 and *Moon v. Halverson*, 206 Minn. 331, 288 N.W. 579 (Loring, J., concurring specially), which emphasized the long-standing historical concerns for an independent and impartial judiciary; and the existence of similar judicial candidate speech restrictions in

most states. *Republican Party*, 247 F.3d at 879-80, P.A. 49a-51a.[6]

The Eighth Circuit observed that Petitioners offered no evidence to contradict that provided by Respondents. *Id.* at 880, P.A. 51a. Petitioners simply have no basis in law or in fact to claim that Respondents failed to meet their burden of proof.

III. The Announce Clause Is Narrowly Tailored To Further Minnesota's Interests.

The Announce Clause, as construed by the Eighth Circuit and the Minnesota Supreme Court, limits judicial "candidates only from publicly making known how they would decide issues likely to come before them as judges." 247 F.3d at 881-82, P.A. 53a. The Announce Clause is narrowly tailored to promote Minnesota's compelling interests because it is the least restrictive means of serving those interests. *See United States v. Playboy Entm't*

[6] Other evidence provided by Respondents includes the Affidavit of former Republican Governor Arne H. Carlson, who appointed six of the seven justices on the current Minnesota Supreme Court and many lower court judges, J.A. 245, at 247 ¶ 6 ("When citizens find themselves in court, they do not want to appear before judges who are pre-committed to particular positions. The judicial selection and retention process should not mirror the legislative process."); and the Affidavit of A.M. (Sandy) Keith, former Chief Justice of the Minnesota Supreme Court, J.A. 266, at 268 ¶ 6 (explaining that permitting judicial candidates to engage in activities prohibited by Canon 5 "would, in time, damage the public's confidence in the judiciary and put pressure on judges to decide cases in ways that would impress the judge's supporters favorably.").

Group, Inc., 529 U.S. 803, 813 (2000); *Reno v. Amer. Civil Liberties Union*, 521 U.S. 844, 874 (1997).

A. The Announce Clause Is Narrowly Tailored Because There Is No Less Restrictive Alternative That Would Promote the State's Compelling Interests.

Petitioner Wersal has acknowledged that he is "able to effectively get out a message without violating even the most restrictive interpretation of the Code." J.A. 44. Petitioner Wersal's belief that he can "effectively get out a message" underscores that Minnesota's Announce Clause is narrowly tailored.[7]

Judicial candidates in Minnesota are permitted to discuss or publicize information about their character, fitness, integrity, background, education, legal experience, work habits, and abilities, all of which the Minnesota Legislature has determined to be highly pertinent to

[7] Petitioner Wersal's concession also highlights the fact that he has not articulated a particular statement he desires to make that violates the Announce Clause as construed. Therefore, no Article III case or controversy is presented because Petitioner Wersal is not subject to imminent state action for violation of the Announce Clause. *United Public Workers of America v. Mitchell*, 330 U.S. 75, 90 (1947) (holding that no Article III case or controversy existed because the Court had to speculate as to political activities plaintiffs desired to engage in or statements they desired to make); *Devine v. Robinson*, 131 F. Supp. 2d 963, 969 (N.D. Ill. 2001) (holding that no Article III case or controversy existed because attorneys were not under any imminent risk of attorney ethical rules being enforced against them). *See also* Respondents' Brief in Opposition to Petition for Writ of Certiorari, at 2-5.

a candidate's qualification for office. *See* Minn. Stat. § 480B.01, subd. 8 (2000) (listing criteria by which Commission on Judicial Selection shall evaluate candidates applying for judicial vacancies to be filled by gubernatorial appointment). Additionally, judicial candidates may discuss how they would handle administrative duties if elected. *See Bundlie v. Christensen*, 276 N.W.2d 69, 72 (Minn. 1979).

Even more importantly, judicial candidates in Minnesota may engage in general discussions of the law, as well as their judicial philosophy. *Republican Party*, 247 F.3d at 882, P.A. 54a; *In re Code of Judicial Conduct*, No. C4-85-697, 2002 WL 126537 (Minn. Jan. 29, 2002), R.A. 1. They may also discuss appellate court decisions, a position set out more than a decade ago in a Judicial Board advisory opinion, which is communicated by letter to all judicial candidates, including Petitioner Wersal. *See* Election Op. Minn. Bd. on Judicial Standards (Oct. 10, 1990), J.A. 62. The Judicial Board has also consistently observed that the Announce Clause allows judicial candidates to respond to a wide array of questions.[8]

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[8] Examples of questions include: "What do you believe to be the most critical issue facing the Hennepin County Criminal Justice System and what do you recommend be done to address it?" Proposed Questions for Judicial Candidates Forums (1996), J.A. 97-103. "As a judge, who are the people you serve and what does it mean to provide good service to them?" *Id.* "Why should voters support you rather than your opponent?" *Id.* "Many victim's advocates have concerns about victim's rights in juvenile court. How would you balance the rights of crime victims and witnesses with the right to confidentiality possessed by juvenile respondents?" *Id.* "If you observed an individual in your courtroom being poorly represented by an unprepared or ineffective lawyer, what would you do?" *Id.* "What is, or will be, your personal mission in your role as judge and how will you go about accomplishing it?" *Id.* "Minnesota is one of a handful of states that does not routinely allow cameras in the courtroom. Where do you stand on this issue and why?" *Id.*

In short, the *only* type of campaign speech that the Announce Clause restricts is public statements regarding how candidates would decide cases likely to come before them. This restriction covers a narrow range of campaign speech. As discussed above, the State has compelling governmental interests in restricting this type of speech because to allow it would compromise judicial impartiality and independence and undermine public confidence in the judiciary. Thus, the Announce Clause is hardly "massively overinclusive"[9] but rather is narrowly tailored to protect the State's compelling interests. *See Stretton*, 944 F.2d at 144; *Berger*, 1988 WL 114792, at *2; *Ackerson v. Kentucky Judicial Retirement and Removal Comm'n*, 776 F. Supp. 309 (W.D. Ky. 1991); *Deters v. Judicial Retirement and Removal Comm'n*, 873 S.W.2d 200 (Ky. 1994).

Petitioner Wersal relies on a few cases in which judicial rules from other states were invalidated. *E.g., Buckley*, 997 F.2d at 228-29; *Beshear v. Butt*, 863 F. Supp. 913, 917-18 (E.D. Ark. 1994); *ACLU v. Florida Bar*, 744 F. Supp. 1094, 1097 (N.D. Fla. 1990); *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 956-57 (Ky. 1990). The Eighth Circuit appropriately distinguished these cases, however, because the judicial candidates were able to discuss no more "than their 'name,

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[9] *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 428 (2000).

rank, and serial number,' *Buckley*, 997 F.2d at 227, 'biographical data,' *ACLU v. Florida Bar*, 744 F. Supp. at 1098, or 'professional history,' *J.C.J.D.*, 803 S.W.2d at 956. . . . " *Republican Party*, 247 F.3d at 883, P.A. 56a. In contrast, judicial candidates in Minnesota are able to discuss a wide variety of topics. *Supra*, at 27-28.

B. Alternatives to the Announce Clause Proposed by Petitioners Do Not Adequately Promote the State's Compelling Interests.

There are no less restrictive alternatives to the Announce Clause that adequately promote Minnesota's compelling interests. Petitioners' claims to the contrary[10] are based on two faulty premises. The first is that the State's only compelling interest is to protect judicial impartiality in particular cases. Pet'r RPM Br. at 8. In fact, the State's compelling interests in promoting judicial independence and maintaining public confidence in its judiciary encompass more than simply maintaining judicial impartiality in a particular case. *See supra*, at 23-25.

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[10] Petitioners' arguments are also inconsistent with the position they took before the Eighth Circuit that the State could restrict certain announcements of judicial candidates. As Petitioners stated: "[j]udicial candidates and others are constitutionally protected in announcing the views of the candidate on disputed legal and political issues *as long as the announcement does not commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.*" *Republican Party of Minnesota v. Kelly*, No. 98-1652 MNST, Plaintiffs' Memorandum of Law [in support of injunctive relief pursuant to F.R.A.P. Rule 8] (dated March 3, 1998) at 13 (emphasis added).

The second faulty premise on which Petitioners' claims are based is that the Announce Clause has not been narrowly construed and that it prohibits "general discussion" of judicial candidates' views. Pet'r RPM Br. at 4. Petitioners focus their arguments on an unreasonably broad interpretation of the Announce Clause that is not at issue here. As noted above, the Announce Clause addresses more than Petitioners' *de minimus* concept of due process while permitting general discussions of the law and the candidate's judicial philosophy, and a host of other issues. *Supra*, at 23-27.

1. The provision restricting pledges or promises does not adequately protect the State's compelling interests.

Petitioners contend that the "pledges or promises" clause, which prohibits a candidate for judicial office from pledging or promising to rule in a particular way in a particular case or type of case, is more narrowly tailored than the Announce Clause. Pet'r RPM Br. at 37-38. The Eighth Circuit appropriately rejected this argument, concluding that a pledges or promises clause "does not reach the full range of activity that can undermine the State's interests in an independent and impartial judiciary." *Republican Party*, 247 F.3d at 877, P.A. 45a. The court recognized that while a pledges or promises clause addresses the type of campaign conduct that is the most blatant threat to the integrity of the judiciary – blunt pledges by candidates to make specific decisions on the bench – it does not address other types of campaign pronouncements that have the same damaging effect:

> It would not, for example, reach declarations by candidates that legislation relating to hot-button social issues is or is not constitutional. It also would not apply to candidates who publicized their opinions about how unsettled legal issues should be resolved. Both instances raise the specter that the candidates are declaring how they would decide questions that might come before them as judges in order to gain support for their candidacies.

Republican Party, 247 F.3d at 877, P.A. 45a-46a, *citing Laird v. Tatum*, 409 U.S. 824, 836 n.5 (1972) (Rehnquist, J. (Mem. on Motion for Recusal) ("For [a judicial nominee] to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without the benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge.")).

Judicial candidates who have made public statements indicating how they will rule on future issues threaten Minnesota's interests in an independent and impartial judiciary and the public's confidence in such a system. For example, consider a Minnesota judicial candidate who publicly states that he believes that the baseball exemption contained in state antitrust laws is "based upon an anachronistic and flawed logic adopted at the turn of the century when baseball was a sport and not a business." Knowing that the future of the Minnesota Twins continues to be in jeopardy as a result of league contraction, this candidate has not made a pledge or promise but, if elected, his statement will surely carry as much political bias into the courtroom as any pledge to

strike down the baseball exemption. Similarly, a judicial candidate who states that no judge should sell out to HMOs by insulating them from liability has not made a pledge, but as a sitting judge, has certainly compromised litigants' confidence in his impartiality on such issues. Likewise, a judicial candidate who says that annoying telemarketers should be criminally liable for violating nuisance laws has not made a pledge but certainly has made an announcement that would taint a telemarketer's confidence if that person becomes the judge assigned to a proceeding involving such an issue. Further, a judicial candidate who states that "all executives of companies who allowed their employees' 401(k) plans to dry up while they got rich should be put in jail for securities fraud" has not made a pledge, but has certainly made an announcement that, if elected, could taint his credibility with a defendant in any such case.

As underscored by these scenarios, the pledges or promises clause does not fully address the type of announcements that undermine Minnesota's compelling interests in a judiciary that is and appears to be impartial and independent to litigants and the public.

2. Recusal and disqualification do not adequately serve Minnesota's compelling interests.

Recusal and disqualification are not adequate alternatives to the Announce Clause. Recusal and disqualification do not sufficiently protect the rights of litigants or even address the State's compelling interest in the public's confidence in its judiciary.

The inadequacy of recusal to address Minnesota's compelling interests is underscored by Justice Kennedy's comments at his confirmation hearings:

> I realize that some Supreme Court nominees have taken the position before this committee that the reason they cannot answer the questions is they have to recuse. I have some trouble with that. I think the reason for our not answering detailed questions with respect to our views on specific cases, or specific constitutional issues, is something quite different.
>
> I think the reason is that *the public expects that the judge will keep an open mind, and that he is confirmed by the Senate because of his temperament and his character, and not because he has taken particular positions on the issues.*

Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 100th Cong. 217 (1987) (emphasis added).

Petitioners' claim that the availability of recusal and disqualification, without an Announce Clause, promotes the State's compelling interests as effectively as the Announce Clause is simply unfounded. Pet'r RPM Br. at 38. The existence of disqualification and recusal do not adequately protect a particular litigant's rights when a judge makes campaign announcements prejudging the litigant's case. *See, e.g.*, Shepard, *supra*, at 1081 ("[N]either the federal recusal rule nor the similar ABA rule will provide anything approaching reliable relief to litigants who find their legal fate in the hands of a judge who has promised the voters to rule against them."). Moreover,

recusal would not remedy the loss of confidence the public would have in the judiciary if judicial candidates routinely opined on issues likely to come before them. In such an environment, decisions of judges would always be suspect, as evidenced by the news accounts chronicling the loss of confidence in the Texas judicial system.[11]

Recusal and disqualification are not less restrictive alternatives to the Announce Clause because they do not address a fundamental purpose of campaign speech – to attract votes. The main reason judicial candidates would make statements communicating how they would decide cases likely to come before them is to gain voter approval. Under such circumstances, the public would not anticipate that candidates, if elected, would then disqualify themselves from such cases; indeed, they would expect exactly the opposite. Therefore, such statements would create the impression that the *public*, rather than the individual judge, can essentially decide how certain types of cases should be decided by voting for particular candidates. Such an impression damages not only the public's perception of the independence of the judiciary, but also would undermine the public's respect for the judiciary in that, if disqualification procedures were used effectively, the intent of voters would be thwarted. *See* Shepard,

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[11] Respondents produced news accounts of the dangers partisan judicial elections have posed in Texas. Editorials from Texas newspapers reported a public perception that judicial rulings were influenced by campaign obligations. Affidavit of Mark Levinger, Exs. 6 and 7, Joint Appendix of Defendants/Appellees to the Eighth Circuit Court of Appeals, D.A. 95, 130-32.

supra, at 1082 ("Surely this arrangement would constitute electoral fraud.").

This alternative would also create serious logistical problems and judicial inefficiencies both for litigants and for the State's judiciary. First, it is unlikely that all litigants would have sufficient information about a judge's campaign statements to decide whether a judge should be disqualified. Attorneys vary in their knowledge of judges and in their ability to research a judge's past judicial campaigns and identify all public pronouncements made by the judge during his or her election campaign. Certainly, *pro se* litigants would be particularly disadvantaged. Second, the attorney time needed to research a judge's campaign statements would add to the cost of litigation. Third, not all of a judge's campaign statements are likely to be reported in the media, thereby limiting any meaningful method by which anyone could ascertain the public statements made by the judge expressing his or her position on an issue arising in a particular case.

Finally, widespread recusals and disqualifications would severely hamper the State's ability to maintain an efficiently operating judicial branch. When a judge is disqualified, another judge must be found. Small towns in Minnesota, however, may have only one or two judges. Further, if the Announce Clause were invalidated, competitive pressures during campaigns would eventually result in numerous judicial candidates announcing their views on any number of hotly contested issues, making it difficult even for litigants in larger cities with many judges to find an impartial replacement judge.

3. Life tenure and elimination of judicial elections are not less restrictive alternatives to the Announce Clause.

Petitioners' claims that life tenure and elimination of judicial elections through use of a merit selection or appointment system are less restrictive alternatives to the Announce Clause are not arguments at all, but baldly asserted conclusory statements. The court below categorically dismissed the "all or nothing" argument that a state can seek to promote judicial independence *or* it can choose to conduct judicial elections, but not both. *Republican Party*, 247 F.3d at 865-67; P.A. 22a-26a. Petitioners' suggestions are merely another variation of this theme.

Minnesota's blended approach to judicial selections is deeply rooted in its history and balances judicial independence and impartiality with public accountability. Life tenure of judges or the elimination of judicial elections would directly contravene the will of Minnesota's citizens as reflected in the State's constitution. Most importantly, while the elimination of judicial campaigns may resolve the problem of what restrictions on campaign speech are necessary to promote the State's compelling interests, the speech of judicial nominees would have to be similarly restricted, raising the same tensions at issue here, as recognized by the Justices of this Court in their Senate confirmation proceedings.

C. The Minnesota Supreme Court Has Authoritatively Adopted a Narrow Construction of the Announce Clause.

The Eighth Circuit's construction of the Announce Clause is consistent with the historical application of the clause and is well-supported by case law. *See Stretton*, 944 F.2d at 144; *Berger*, 1988 WL 114792, at *3. The further action of the Minnesota Supreme Court in expressly adopting the court of appeals' interpretation of the Announce Clause removes any question regarding the propriety of this clause's narrowed construction. *In re Code of Judicial Conduct*, No. C4-85-697, 2002 WL 126537 (Minn. Jan. 29, 2002), R.A. 1. Simply stated, the interpretation of state law has been authoritatively and definitively decided by the Minnesota Supreme Court.[12] *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992) (holding that construction by state court of state law is binding on federal court); *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (holding that state court interpretation of state law is binding on federal court as though precise words had been written into the law).

In a last-ditch effort, Petitioners contend that the Eighth Circuit's interpretation of the Announce Clause is

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[12] In any event, the court of appeals correctly decided that Petitioners waived the construction issue by failing to raise it in their opening briefs submitted to the court. *Republican Party*, 247 F.3d at 881, P.A. 52a. The Eighth Circuit also was correct in concluding that, if the issue had been properly raised, the construction was appropriate under the law. *Id.* at 881, P.A. 52a-53a.

unconstitutionally vague. Pet'r RPM Br. at 24; Pet'r Wersal Br. at 41-42. This Court has held, however, that a statute can only be declared unconstitutional for vagueness if men of ordinary intelligence, using ordinary common sense, "must necessarily guess at its meaning." *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973) (citations omitted). As this Court further stated in *Broadrick*,

> Words inevitably contain germs of uncertainty . . . . "[A]lthough the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms the ordinary person exercising *ordinary common sense* can sufficiently understand and comply with . . . . "

413 U.S. at 608 (quoting *Letter Carriers*, 413 U.S. at 578-79) (emphasis added).

The Announce Clause, as construed, clearly allows a judicial candidate of "ordinary intelligence," exercising "ordinary common sense," to comprehend the type of comments that are proscribed by the clause. The meaning of the Announce Clause is clear: judicial candidates cannot publicly make known how they would decide issues likely to come before them as judges. The Justices of this Court had no difficulty applying such a concept in their confirmation hearings. Indeed, a judicial candidate who is familiar with the role of a judge should be able to comprehend the meaning of the Announce Clause as construed.

CONCLUSION

The Eighth Circuit described the horns of the dilemma regarding public statements made by judicial candidates and nominees: after being placed on the bench, the judge must follow his or her statements and be accused of prejudging the case or must ignore the statements and be accused of being a "dissembler." *Republican Party*, 247 F.3d at 878, P.A. 46a. Each Justice of this Court articulated a common principle during their confirmation hearings before the United States Senate, namely, that it would be improper for a judicial nominee to publicly state a position on issues likely to come before the Court.

The decision in this case will have far-reaching consequences. It will affect not only the elections of state court judges, but also the propriety of the use of Announce Clause principles in confirmation hearings of future federal judges. Respondents respectfully request

that this Court affirm the decision of the Eighth Circuit Court of Appeals.

February 19, 2002

Respectfully submitted,

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No. 01-521

In The

Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, ET AL.,

Petitioners,

v.

VERNA KELLY, ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

APPENDIX FOR RESPONDENTS

In re the Code of Judicial Conduct. C4-85-697, Supreme Court Order, January 31, 2002.

STATE OF MINNESOTA

IN SUPREME COURT

C4-85-697

In re the Code of Judicial Conduct

ORDER

In *Republican Party of Minnesota v. Kelly*, 247 F.3d 854 (8th Cir. 2001), *cert. granted*, (U.S. Dec. 3, 2001) (No. 01-521), the United States Court of Appeals for the Eighth Circuit held that the provision in the Minnesota Code of Judicial Conduct that prohibits a candidate for judicial office from announcing "his or her views on disputed legal or political issues," Canon 5(A)(3)(d)(i) (the announce clause), as construed by the district court in *Republican Party of Minnesota v. Kelly*, 63 F. Supp.2d 967 (D. Minn. 1999), is narrowly tailored to further compelling state interests. It has come to the attention of this court that the interpretation of the announce clause by the federal district and appeals courts has given rise to questions about the interpretation of the announce clause by this court. We issue this order adopting the interpretation of the federal court of appeals to clarify our position to the Board on Judicial Standards and the Lawyers Board of Professional Responsibility, which have the first level of responsibility for enforcement of the Canon.

IT IS HEREBY ORDERED that the announce clause of Canon 5(A)(3)(d)(i) shall be enforced in accordance with the interpretation of that clause by the United States

Court of Appeals for the Eighth Circuit in *Republican Party of Minnesota v. Kelly*, 247 F.3d 854 (8th Cir. 2001).

Dated: January 29, 2002

BY THE COURT:

/s/ Kathleen A. Blatz
Chief Justice